Supreme Court, U.S.
FILED
AUG 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE NATIONAL RIFLE ASSOCIATION OF AMERICA, NEAL KNOX, WILLIAM B. BINSWANGER, WARREN CASSIDY, THE NATIONAL RIFLE ASSOCIATION POLITICAL VICTORY FUND, and MICHAEL K. MCCABE,

Petitioners,

v.

MINNESOTA STATE ETHICAL PRACTICES BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether a judgment of a district court must be vacated, pursuant to Fed. R. Civ. P. 60(b)(4), where it is undisputed that the district court did not have subject-matter jurisdiction *ab initio* but there was an "arguable basis" on which subject-matter jurisdiction could have rested.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-

THE NATIONAL RIFLE ASSOCIATION OF AMERICA, NEAL KNOX, WILLIAM B. BINSWANGER, WARREN CASSIDY, THE NATIONAL RIFLE ASSOCIATION POLITICAL VICTORY FUND, and MICHAEL K. MCCABE,

Petitioners,

v.

MINNESOTA STATE ETHICAL PRACTICES BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The order of the Court of Appeals denying the Petition for Rehearing with Suggestion for Rehearing *En Banc* is not reported and is reproduced in Appendix A. The order of the Court of Appeals affirming the District Court's opinion is not reported and is reproduced in Appendix B. The unreported opinion of the District Court is reproduced in Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on February 8, 1988; a timely petition for rehearing, with suggestion for rehearing *en banc*, was denied on May 20, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

Fed. R. Civ. P. 60. **Relief from Judgment or Order.** . . . (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void. . . .

STATEMENT OF THE CASE

Parties

The Minnesota State Ethical Practices Board (MEPB) is a state agency created pursuant to the Minnesota Ethics in Government Act, *Minn. Stat.* 10A.01 *et seq.* and assigned the responsibility of enforcing that Act. The National Rifle Association (NRA) is an incorporated, not-for-profit membership organization of approximately 2.8 million members. The National Rifle Association Institute for Legislative Action (NRA-ILA) is an operating division of the NRA, primarily concerned with the legislative and political activities of the Association. The National Rifle Association Political Victory Fund (NRA-PVF) is the separate, segregated fund of the NRA, as that term is defined by the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq.*

Neal Knox was the Executive Director of NRA-ILA and Chairman of the NRA-PVF from January 12, 1978 to April 15, 1982. Warren Cassidy was the Executive Director of NRA-ILA and Chairman of the NRA-PVF from April 15, 1982 until May, 1986. William B. Binswanger is the treasurer of NRA. Michael K. McCabe was the treasurer of the NRA-PVF from April 15, 1982 until July 30, 1985.

Facts

While the procedural history of this case is somewhat complex, the material facts can be summarized as follows.

After Respondent filed suit in the appropriate state court in 1982 against Petitioners alleging violations of the Minnesota Ethics in Government Act, Petitioners' former counsel removed the case to the U.S. District Court for the District of Minnesota on the ground that there were federal constitutional and statutory *defenses* to the allegations in the Respondent's complaint.[1] Without expressly considering or ruling on the question of subject-matter jurisdiction—apparently because Respondent, which had initially filed a motion to remand to the state court, withdrew its motion to remand—the District Court ruled in favor of Respondents on the merits of the case and, *inter alia*, entered a permanent injunction against Petitioners.

On appeal of the District Court's judgment to the U.S. Court of Appeals for the Eighth Circuit—which the Court of Appeals affirmed, 761 F.2d 509 (8th Cir. 1985)—neither Petitioners' former counsel nor Respondent's counsel raised the issue of subject-matter jurisdiction. In subsequently petitioning this Court for a Writ of Certiorari, however, Petitioners' present counsel raised the issue of subject-matter jurisdiction. Notably, Respondent's opposition to the Petition did *not* assert that the District Court in fact had subject-matter jurisdiction. The Petition was denied by this Court. 106 S.Ct. 853 (1986).

Following denial of the Petition for a Writ of Certiorari, Petitioners sought to have the Court of Appeals,

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[1] Under this Court's decision in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S. Ct. 2841 (1983), the district court plainly did not have subject-matter jurisdiction pursuant to 28 U.S.C. 1441.

through the vehicle of a Motion to Recall the Mandate, consider the issue of subject-matter jurisdiction for the first time. Again, as in this Court, Respondent did not assert—as it never has at any stage of this litigation—that the District Court in fact had subject-matter jurisdiction; Respondent contended only that a Motion to Recall Mandate was procedurally inappropriate. After the Court of Appeals, without opinion, denied Petitioners' Motion to Recall Mandate, Petitioners filed, in the District Court, a motion to vacate the judgment of the District Court, pursuant to Fed. R. Civ. P. 60(b)(4), since there remained, and still remains, an outstanding permanent injunction against Petitioners. After that motion was denied by the District Court (See Appendix C), Petitioners appealed to the Court of Appeals which, on February 8, 1988, affirmed, without opinion, the District Court's denial of Petitioners' Motion to Vacate. See Appendix B. A subsequent Petition for Rehearing with Suggestion For Rehearing *En Banc* was also denied, without opinion, on May 20, 1988. See Appendix A.

REASON FOR GRANTING THE PETITION

In affirming the District Court's opinion that it need not vacate a judgment pursuant to Fed. R. Civ. P. 60(b)(4) since there was an "arguable basis" on which subject-matter jurisdiction *could* have rested even though it was undisputed that the district court did not have subject matter jurisdiction *ab initio*, the Court of Appeals' decision is in conflict with applicable decisions of this Court and of other courts of appeals.

While the evolution of this case is long and complex, it now stands before this Court on a single issue going to the very power of federal courts to adjudicate "cases or controversies." As will be shown below, in affirming the District Court's opinion denying Petitioners' Rule 60(b)(4) motion, the Eighth Circuit joins the Second Circuit in being squarely at odds with the decisions of this Court and of five other circuits on the narrow but significant

issue of whether a judgment resulting from a district court's erroneous assumption of subject matter jurisdiction must, in all cases, be vacated. To resolve that conflict and prevent the further adoption of the unjustified principle established by the Eighth and Second Circuits, this Court should grant this petition.

A) The heart of the opinion of the District Court in the instant case (as affirmed by the Court of Appeals) is its conclusion that, while subject-matter jurisdiction was absent, its prior judgment need not be vacated since there was "an arguable basis for a finding of [subject-matter] jurisdiction" Appendix C, at 7a. The standard adopted by the District Court in denying Petitioners' Rule 60(b)(4) motion was derived primarily from the District Court's reading of the Second Circuit's decision in *Nemaizer v. Baker*, 793 F.2d 58 (2d Cir. 1986) in conjunction with *Kansas City Southern Railway Company v. Great Lakes Carbon Corporation*, 624 F.2d 822 (8th Cir. 1980) (*en banc*). Thus, notwithstanding the fact that the District Court indisputably lacked subject-matter jurisdiction, the Eighth Circuit, in affirming the District Court's opinion, has essentially concluded that a federal district court *may* decide a case when it lacks subject-matter jurisdiction as long as there was at least "an arguable basis" on which the district court could have rested jurisdiction. As *Nemaizer* was the key element in the District Court's reasoning, an analysis of it is in order.

In *Nemaizer*, the Second Circuit was reviewing a district court order which amended, pursuant to Rule 60(b), its previous order dismissing a prior action with prejudice. At the outset, the Second Circuit stated that it would

> assume without deciding that appellees correctly claim that this case was improperly removed and

> the district court improperly exercised its jurisdiction . . . . 793 F.2d at 64.

Notwithstanding its recognition of the fact that subject matter jurisdiction was absent, the divided Second Circuit panel, relying on *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), which in turn relied on *Avco Corp. v. Aero Lodge No. 735*, 376 F.2d 337 (6th Cir. 1967), *aff'd*, 390 U.S. 557 (1968), held that

> the district court could *reasonably* have found that ERISA's remedial provision, 29 U.S.C. § 1132(a), so completely preempted N.Y. Labor Law § 198-c that an action brought under § 198-c "arose under" ERISA. (emphasis added). 793 F.2d at 65.

The court based its holding on its conclusion that success on Rule 60(b)(4) motion required that there be both "a 'total want of jurisdiction' *and* no arguable basis on which [the district court] could have rested a finding that it had jurisdiction." 793 F.2d at 65. Thus, in the Second Circuit's view, even if there was a "total want of jurisdiction," a district court's judgment would be beyond attack if there were an "arguable basis"—whatever "arguable" means—on which the district court could have grounded its eroneous finding of jurisdiction. Indeed, in concluding that the district court's judgment was not void, the Second Circuit made clear that its decision was based *not* on whether the district court's finding "was correct, *only* that it was reasonable . . . ." 793 F.2d at 65. In short, the Second Circuit determined that the key to questions of subject-matter jurisdiction is not whether subject-matter jurisdiction in fact existed but only whether district court's exercise of jurisdiction was "reasonable." Based on *Nemaizer*, the District Court in the instant case concluded that its prior implicit finding [2]

[2] The District Court did not actually consider or rule on subject-matter jurisdiction as Respondent withdrew its motion to remand to the state court.

of subject matter jurisdiction was similarly "reasonable" since it was "arguable" that "the Minnesota Ethics and Government Act was preempted by the Federal Election Campaign Act of 1971. . . ." Appendix C, at 7a.[3]

B) In conflict with *Nemaizer*—as well as with the Eighth Circuit in the instant case—this Court, in *Insurance Corporation of Ireland v. Compagnie Des Bauxites*, 456 U.S. 694, 102 S.Ct. 2099 (1982), unanimously and unqualifiedly wrote that

> Federal courts are courts of limited jurisdiction . . . . Jurisdiction of the lower federal courts is . . . limited to those subjects encompassed within a statutory grant of jurisdiction. . . . Certain legal consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, (citation omitted), principles of estoppel do not apply, (citation omitted), and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion. "[T]he rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record." (citation omitted). (emphasis added) 456 U.S. at 701-2, 102 S.Ct. at 2103-4.

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[3] In fact, it was not even "arguable" that federal law preempted Minnesota law since the federal law expressly stated that it is preemptive only "with respect to election to Federal office" (2 U.S.C. 453) whereas Minnesota law is concerned only with state elections and legislative activities. In any case, whether the question was "arguable" is now moot since Respondent does not contend that federal law preempted state law and, as a result, that the District Court had subject-matter jurisdiction.

Plainly, this language allows of no exception and establishes beyond doubt the principle that either a federal court has subject-matter jurisdiction or it does not; there is not even the slightest suggestion that a district court's erroneous assumption of subject-matter jurisdiction should not be disturbed if an appellate court is satisfied that there was a "reasonable" analytic process which the district court could have utilized in concluding it had subject-matter jurisdiction. Indeed, the rule established by the Second Circuit and adopted by the Eighth Circuit actually allows what this Court has forbidden—the assumption of jurisdiction by a federal court where none has been granted by statute. It is thus evident that the Eighth and Second Circuits have crafted a rule that has no basis in this Court's jurisprudence.

C) Consistent with this Court's long-established subject-matter jurisdiction jurisprudence, the Ninth Circuit, in *Gould v. Mutual Life Insurance Company of New York*, 790 F.2d 769 (9th Cir. 1986), *cert. den.*, 107 S.Ct. 580 (1986), reiterated the principles established in the Ninth Circuit regarding subject-matter jurisdiction.

First, the Ninth Circuit wrote that "[r]emoval is a question of federal subject-matter jurisdiction, *reviewable de novo.*" (emphasis added) 790 F.2d at 771. By contrast, the Second Circuit in *Nemaizer*—and thus the Eighth Circuit in the instant case—held only that an appellate court need "determine whether a reasonable basis existed for the lower court's implicit finding that it had jurisdiction." 793 F.2d at 65. Thus, the Eighth and Second Circuits are in conflict with the Ninth Circuit since the former have rejected *de novo* review of the question of subject-matter jurisdiction and substituted therefore review only of whether there was "an arguable basis" upon which subject matter jurisdiction could have rested.

Secondly, as a result of its careful adherence to this Court's teachings, the Ninth Circuit ruled that "a dis-

trict court is '*compelled* to exercise its authority under Rule 60(b)(4) to vacate' judgments in which it had erroneously asserted its own jurisdiction." (emphasis added) 790 F.2d at 774. Clearly, therefore, unlike the Eighth and Second Circuits, the Ninth Circuit has not allowed district courts to determine only if there was "an arguable basis" upon which a finding of subject-matter jurisdiction could have rested; rather, the Ninth Circuit simply mandates that, where jurisdiction is erroneous, the judgment must be vacated.

Predating the Ninth Circuit's decision in *Gould*, but very much consistent with it and with this Court's decision in *Insurance Corporation of Ireland*, the Sixth Circuit, in *Jordon v. Gilligan*, 500 F.2d 701 (6th Cir. 1974), *cert. den.*, 95 S. Ct. 1996 (1975), wrote that

> a court considering a motion to vacate [pursuant to Rule 60(b)(4) on the ground that the district court lacked subject-matter jurisdiction] has no discretion in determining whether it should be set aside. 500 F.2d at 704.

While *Jordon* involved a specific constitutional limitation (the Eleventh Amendment) on the jurisdiction of the federal courts, the principle enunciated in *Jordon*—that either a federal court has subject matter jurisdiction or it does not—applies equally to cases where the federal court exceeds "a statutory grant of jurisdiction," *Insurance Corporation of Ireland*, 456 U.S. at 701, 102 S. Ct. at 2103, since federal courts are "courts of limited jurisdiction" and such jurisdiction "is limited to those subjects encompassed within a statutory grant of jurisdiction." Ibid. Thus, unlike the Eighth and Second Circuits, the Sixth Circuit plainly has not adopted an "arguable basis" standard for determining the validity, in regard to subject matter jurisdiction, of district court judgments.[4]

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[4] Notably, the Sixth Circuit rejected the contention that, because "appellants failed to object to the award [judgment] until after

Recognizing the cogency of the Sixth Circuit's position, the First Circuit, in *Honneus v. Donovan*, 691 F.2d 1 (1st Cir. 1982), observed, regarding a motion made pursuant to Rule 60(b)(4), that "the district court had no discretion [to grant the motion] because a judgment is either void or it is not." 691 F.2d at 2. The significance of this statement to the instant case lies in the fact that the First Circuit had earlier equated the "absence of subject matter jurisdiction" to a "total want of jurisdiction" in distinguishing the absence of subject matter jurisdiction "from an error in the exercise of jurisdiction." *Lubben v. Selective Service System Local Board No. 27*, 453 F.2d 645, 649 (1st Cir. 1972). Clearly, therefore, the First Circuit recognized that the absence of subject-matter jurisdiction compelled the granting of a Rule 60(b)(4) motion to vacate.[5]

The Seventh Circuit has taken a position similar to the First Circuit, holding that a void judgment exists "where a court usurps power by rendering a judgment over maters beyond the scope of authority granted to it by its creators." *Ben Sager Chemicals International v. E. Targosz & Co.*, 560 F.2d 805, 812 (7th Cir. 1977). As this Court has made abundantly clear that a federal court's subject matter jurisdiction is "limited to those subjects encompassed within a statutory grant of jurisdiction," *Insurance Corporation of Ireland v. Compagnie Des Bauxites*, 456 U.S. at 701, 102 S.Ct. at 2103, it is plain that the Seventh Circuit views as void a district court judgment entered by a district court without

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the judgment was entered," the issue of subject matter jurisdiction could not be raised. 500 F.2d at 710.

[5] The First Circuit did not vacate the judgment in *Honneus* since the district court's error was only an assumption of *diversity*, not subject-matter, jurisdiction. Unlike subject-matter jurisdiction, which is "limited to those subjects encompassed within a statutory grant of jurisdiction," *Insurance Corporation of Ireland*, 456 U.S. at 701, 102 S. Ct. at 2103, absence of diversity jurisdiction "does not render the judgment null but only erroneous." 691 F.2d at 2.

subject-matter jurisdiction. Thus, the Seventh Circuit also has not adopted—and would find repugnant—the principle adopted by the Eighth and Second Circuits.

Finally, in *Potomac Passengers Association v. Chesapeake and Ohio Railway Co.*, 520 F.2d 91 (D.C. Cir. 1975), the District of Columbia Circuit wrote:

> That both parties to this suit, and the trial judge, proceeded on the assumption that the case was properly before the District Court does not alter our responsibility. Federal subject-matter jurisdiction cannot be created by consent, waiver, or even estoppel. 520 F.2d at 95, n.22.

As a result, while "regretful of the expenditures of time and energy which have gone into the present litigation," 520 F.2d at 95, the court unanimously reversed the district court's judgment on the second appeal as "the District Court's subject-matter jurisdiction was incorrect as a matter of law." 520 F.2d at 95. Moreover, in a statement of peculiar relevance to this case, the court held that

> If a federal court is powerless to adjudicate a controversy, it is duty-bound to recognize that fact, however belated its realization. . . . When an appellate court makes so fundamental an error as that of sustaining federal subject-matter jurisdiction where none exists, we think the court must exercise its discretion to correct that mistake. 520 F.2d at 95, n.22.

Thus, as with the Ninth, Sixth, First, and Seventh Circuits, the District of Columbia Circuit has concluded that finding the absence of subject-matter jurisdiction ends any inquiry regarding the validity of a district court judgment and mandates that the judgment be vacated. It is, as a result, clear that the Eighth and Second Circuits are in conflict with the decisions of this Court and the decisions of five other circuits.

CONCLUSION

For the reasons set forth above, this Court should issue a Writ of Certiorari to the Eighth Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5173MN

MINNESOTA STATE ETHICAL PRACTICES BOARD,
Appellee,

vs.

THE NATIONAL RIFLE ASSOCIATION OF AMERICA, *et al.*,
Appellants.

Appeal from the United States District Court
for the District of Minnesota

Appellants' petition for rehearing en banc has been considered by the Court and is denied.

Appellants' petition for rehearing by the panel is also denied.

The MEPB motion to tax costs against the NRA pursuant to Fed. R. App. P. 39 is denied as untimely filed; the motion to assess costs against the NRA for filing an alleged frivolous petition for rehearing en banc under 8th Cr. R.16(e) is denied.

May 20, 1988

Order entered at the Direction of the Court:

/s/ [Illegible]
Clerk
U.S. Court of Appeals
Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5173

MINNESOTA STATE ETHICAL PRACTICES BOARD,
Appellee,

v.

THE NATIONAL RIFLE ASSOCIATION OF AMERICA, NEAL KNOX, WILLIAM B. BINSWANGER, WARREN CASSIDY, THE NATIONAL RIFLE ASSOCIATION POLITICAL VICTORY FUND and MICHAEL MCCABE,
Appellants.

Appeal from the United States District Court
for the District of Minnesota

Submitted: December 14, 1987

Filed: February 8, 1988

Before LAY, Chief Judge; HEANEY and MAGILL, Circuit Judges.

PER CURIAM.

Finding no error of fact or law in the district court's opinion, we affirm pursuant to 8th Cir. R. 14.

A true copy.

ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civ. 4-82-1458

MINNESOTA STATE ETHICAL PRACTICES BOARD,
Plaintiff,

vs.

THE NATIONAL RIFLE ASSOCIATION OF AMERICA, NEAL KNOX, WILLIAM B. BINSWANGER, WARREN CASSIDY, THE NATIONAL RIFLE ASSOCIATION POLITICAL VICTORY FUND and MICHAEL MCCABE,
Defendants.

Robert A. Alsop, Esq., and Jeffrey R. Brauchle, Esq., Holmes & Graven, 470 Pillsbury Center, Minneapolis, MN 55402, appeared for plaintiff.

Margaret Mead Amundson, Esq., 533 West Parkdale Plaza, 1660 South Highway 100, Minneapolis, MN 55416; and Richard E. Gardiner, Esq., 1600 Rhode Island Ave. N.W., Washington, D.C. 20036, appeared for defendants.

MEMORANDUM OPINION AND ORDER

On October 8, 1982, plaintiff Minnesota State Ethical Practices Board brought this action in Ramsey County District Court against the National Rifle Association of America (NRA) and a number of the NRA's officers seeking a declaratory judgment and permanent injunctive relief under the Minnesota Ethics in Government Act, Minn. Stat. § 10A.01 et seq. After removal, the court [1] entered judgment for plaintiff, and the Eighth

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[1] The Honorable Miles W. Lord, retired United States District Judge, presided over all trial court proceedings in this case. The

Circuit Court of Appeals affirmed. Now before the court is defendants' motion pursuant to Fed. R. Civ. P. 60(b) to dissolve the injunctions, vacate the judgment, and remand the case to state court on the ground that no subject matter jurisdiction exists.

Background

This case has a lengthy and complicated history which will only be summarized here. Plaintiff filed this action over four years ago in Minnesota state court, alleging that defendants violated the Minnesota Ethics in Government Act by failing to register as lobbyists and as a political fund in conducting their political activities. Plaintiff's complaint asserted only state law causes of action, although it anticipated that defendants might raise a First Amendment defense. On November 8, 1982, defendants filed a removal petition, arguing that federal question jurisdiction existed because the state statute was preempted by the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-455, and because the suit threatened to deprive defendants of their First Amendment rights. Plaintiff subsequently moved for remand to state court, contending that no subject matter jurisdiction existed. Although the court never explicitly ruled on the motion to remand, it stated in its February 22, 1983 opinion denying defendants' motion to dismiss that "jurisdiction in the instant case is proper under the applicable law. . . ."

On May 2, 1984, the court entered judgment for plaintiff and issued an injunction requiring defendants to comply with the state statute. The Court of Appeals affirmed, rejecting defendants' constitutional challenge to the statute. 761 F.2d 509 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 853 (1986). On January 31, 1986, defendants

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instant motion was filed after his retirement and was assigned to this court for resolution.

filed a motion to recall mandate and vacate judgment in the Court of Appeals on the ground that subject matter jurisdiction was lacking. The Court of Appeals denied the motion without opinion on February 11, 1986. Defendants subsequently made their motion in this court.

Discussion

Defendants argue that federal jurisdiction never existed in this case because it could not be removed on the basis of an anticipated federal defense to a state law cause of action. Defendants note that plaintiff itself earlier moved for remand on the basis that no federal jurisdiction existed and has never asserted that federal jurisdiction exists. Defendants admit that they were responsible for the removal of the case, but argue that parties cannot consent to confer federal jurisdiction where it does not exist. Moreover, defendants assert that the validity of the court's order is dependent upon the existence of subject matter jurisdiction; without it, they argue, the order should be vacated.

Plaintiff responds that the federal courts have dealt with this case nine times and argues that there must be some finality to judgments. According to plaintiff, *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940), establishes that a final judgment on the merits is *res judicata* on the issue of subject matter jurisdiction, even though that issue was not litigated. Plaintiff also finds support in the Second Restatement of Judgments which provides that issuance of a judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation subject to certain exceptions, which, according to plaintiff, are not met here.

Defendants reply that *Chicot County* is inapplicable because the Supreme Court was concerned there with raising the issue in a subsequent suit. Defendants claim that the instant case is distinguishable because the issue

has been raised at a later stage of the same suit rather than in a subsequent action. In addition, defendants assert that the case falls within all three exceptions to the rule set forth in the Second Restatement of Judgments.

Plaintiff also argues that the "law of the case" doctrine, as applied to the Court of Appeals' decision denying defendants' motion to recall mandate and vacate judgment, precludes this court from ruling on defendants' motion. Here, plaintiff argues that the one-sentence order issued by the Court of Appeals "was clearly in response to the NRA's specific argnment claiming that the district court lacked subject matter jurisdiction." Plaintiff further asserts that none of the three exceptions to the doctrine applies.

Defendants argue that the "law of the case" doctrine does not preclude the court from considering their motion because it is not clear that the Court of Appeals decided the issue and because the Court of Appeals issued an unexplained order rather than an "opinion." According to defendants, the Court of Appeals may have relied on plaintiff's argument that recalling a mandate is unusual relief that should be granted sparingly rather than reaching the merits of the motion.

In *Kansas City Southern Railway Co. v. Great Lakes Carbon Corp.*, 624 F.2d 822 (8th Cir.) (en banc), *cert. denied*, 449 U.S. 955 (1980), the Court of Appeals set the standard to be applied to a motion to vacate judgment for lack of subject matter jurisdiction under Fed. R. Civ. P. 60(b):

> Absence of subject matter jurisdiction *may*, in certain cases, render a judgment void. However, this occurs only where there is a plain usurpation of power, when a court wrongfully extends its jurisdiction beyond the scope of its authority. Stated another way, such plain usurpation of power occurs

> when there is a "total want of jurisdiction" as distinguished from "an error in the exercise of jurisdiction." . . . [E]rror in interpreting a statutory grant of jurisdiction is not equivalent to acting with total want of jurisdiction. Such an erroneous interpretation does not render the judgment a complete nullity. A void judgment, as opposed to an erroneous one, is one which from its inception was legally ineffective.

Id. at 825 (citations omitted). "[A] court will be deemed to have plainly usurped jurisdiction only when there is . . . no arguable basis on which it could have rested a finding that it had jurisdiction." *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986). Accordingly, the court must determine whether or not there was an arguable basis on which the finding of jurisdiction in this case could have rested.

The Supreme Court has established that "if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23-24 (1983) (citing *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968)). In their petition for removal, defendants argued that the Minnesota Ethics in Government Act was preempted by the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-455. Defendants' preemption assertion, although perhaps erroneous, presents an arguable basis for a finding of jurisdiction. *See Nemaizer*, 793 F.2d at 65 (district court's implicit finding that it had jurisdiction on basis of federal preemption "was reasonable, and therefore immune from collateral challenge under Rule 60(b)(4)"). As a result, the court's judgment is not void and defendants' motion should be denied.[2]

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[2] Under the circumstances, the court need not determine whether the law of the case doctrine precludes consideration of the motion.

Accordingly, based on the above and all the files, records, and proceedings herein, IT IS HEREBY ORDERED that defendants' motion to dissolve the injunction, vacate the judgment and remand the case is denied.

Dated: February 19, 1987

/s/ Diana E. Murphy
DIANA E. MURPHY
United States District Judge

Although the basis of the Court of Appeals denial of defendants' motion is not explicitly stated, defendants did raise the same issue of subject matter jurisdiction before that court. Obviously, this court would not knowingly rule counter to the appellate court.

Several courts have ruled that the law of the case doctrine does not apply to the issue of subject matter jurisdiction. *See, e.g., Amen v. Dearborn*, 718 F.2d 789, 793-94 (6th Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984); *Green v. Department of Commerce*, 618 F.2d 836, 839 n.9 (D.C. Cir. 1980).

(2)

No. 88-300

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

October Term, 1988

THE NATIONAL RIFLE ASSOCIATION OF AMERICA, NEAL KNOX, WILLIAM B. BINSWANGER, WARREN CASSIDY, THE NATIONAL RIFLE ASSOCIATION POLITICAL VICTORY FUND, and MICHAEL K. McCABE,

Petitioners,

v.

MINNESOTA STATE ETHICAL PRACTICES BOARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a district court judgment may withstand a Rule 60(b)(4) motion even though jurisdiction may be lacking provided there was an arguable basis for the exercise of jurisdiction and not a total want of jurisdiction?

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IN THE

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No. 88-300

THE NATIONAL RIFLE ASSOCIATION OF AMERICA, NEAL KNOX, WILLIAM B. BINSWANGER, WARREN CASSIDY, THE NATIONAL RIFLE ASSOCIATION POLITICAL VICTORY FUND, and MICHAEL K. McCABE,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Minnesota State Ethical Practices Board respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Eighth Circuit Court of Appeal's decision in this case. The opinion and that of the district court are reproduced in Petitioner's Appendix B and C.

STATEMENT OF THE CASE

The procedural history of the litigation of this lawsuit is protracted and repetitive. The petitioners, the National Rifle Association, et al., (hereinafter collectively referred to as "NRA") have removed and appealed this lawsuit continuously through the federal court system over the past six years.

In fact, this current petition is the second time NRA has filed a petition for writ of certiorari in this case before the United States Supreme Court. The first time NRA filed a petition for a writ of certiorari in this case, one of its arguments was lack of subject matter jurisdiction. This is now the sole argument of this petition. NRA's previous argument of lack of subject matter jurisdiction from NRA's first petition to this Court is reproduced in State's Appendix A. This Court denied NRA's first petition for writ of certiorari. *Minnesota State Ethical Practices Board v. National Rifle Association*, 761 F.2d 509 (8th Cir. 1985), 474 U.S. 1082 (1986). State's Appendix B.

This lawsuit started six years ago when the respondent, Minnesota State Ethical Practices Board (hereinafter "State") filed the present action in state court, alleging that the NRA had violated the Minnesota Ethics in Government Act, Minn. Stat. ch. 10A, by failing to register as a lobbyist and as a political fund in conducting its lobbying and political activities. NRA filed a removal petition, arguing that federal question jurisdiction existed because the state statute was preempted by the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-455, and because the suit threatened to deprive NRA of its first amendment rights. Although the State initially moved to remand the case to state court, contending that no subject matter jurisdiction existed, the State withdrew

its motion to remand and the present matter remained in federal court.

On May 2, 1984, after a trial the federal district court entered judgment for the State and issued an injunction requiring NRA to comply with the state statutes. NRA sought a stay of the district court's decision. The stay request was denied. The Eighth Circuit Court of Appeals also denied the motion for a stay and this Court denied NRA's application for a stay of mandate. Eventually, NRA complied with the district court's order in December 1984 by filing the names, addresses, and occupations of all the contributors who gave more than $50 to the NRA during the relevant time period.

NRA appealed the merits of the district court's decision to the Eighth Circuit Court of Appeals, but did not raise the issue of subject matter jurisdiction at that time. Following briefing and oral argument, the Eighth Circuit affirmed the district court's decision, rejecting NRA's constitutional challenge to the statute. *Minnesota State Ethical Practices Board v. National Rifle Association*, 761 F.2d 509 (8th Cir. 1985). NRA's petition for rehearing *en banc* before the Eighth Circuit was also denied. NRA then sought a writ of certiorari from this Court, arguing both the merits and, for the first time, lack of federal subject matter jurisdiction. Certiorari was denied by this Court. *Minnesota State Ethical Practices Board v. National Rifle Association*, 474 U.S. 1082 (1986).

Undaunted, NRA then returned to the Eighth Circuit Court of Appeals, petitioning for a revocation of its mandate. The sole basis for this motion was the lack of federal subject matter jurisdiction. The Court of Appeals denied the motion. NRA then returned to the district court, moving to vacate judgment and remand to the state court pursuant to Fed. R. Civ. P. 60(b)(4) due to lack of subject matter jurisdiction. The dis-

trict court denied the motion. Petitioner's Appendix C. NRA then resumed its trek back up the federal court appellate system by appealing the district court's denial of its motion to the Eighth Circuit. On February 8, 1988, the Court of Appeals affirmed the district court's decision without opinion. Petitioner's Appendix B. NRA's Petition for Rehearing with Suggestion for Rehearing *En Banc* was also denied. Petitioner's Appendix A. On August 18, 1988, NRA petitioned this Court for a writ of certiorari.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

The Petition for Writ of Certiorari should be denied because the challenged court decision does not conflict with prior Supreme Court precedent or decisions of other courts of appeals.

I. The Challenged Decision Is Valid And Correct.

Although NRA cloaks its argument in its petition as a conflict between the circuits and this Court, in reality, NRA is challenging the correctness of the standard articulated by the Eighth and Second Circuits. This Court's exercise of its certiorari jurisdiction depends on numerous factors other than the perceived correctness of the decision below. *Ross v. Moffitt*, 417 U.S. 600, 615 (1974).

NRA is challenging the standard developed by the courts for setting aside a final judgment for lack of subject matter jurisdiction under Fed. R. Civ. P. 60(b)(4). In support for its challenge, NRA cites several of this Court's decisions including *Insurance Corporation of Ireland v. Compaignie des Bauxites*, 456 U.S. 694 (1982) and *Franchise Tax Board*

v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983), quoting the strict language on the limitation on federal jurisdiction.

The State does not disagree that the federal courts are of limited jurisdiction. The State agrees that, if there is an error in the exercise of subject matter jurisdiction, the decision should be reversed on direct appeal.

However, a final judgment makes a difference. It marks a formal point at which considerations of economy, certainty, reliance and comity become compelling.

In the present case, there is indisputably a final decision of the case on the merits. NRA had the opportunity to raise its challenge of lack of subject matter jurisdiction on direct appeal. In fact, it did raise the issue on direct appeal to this Court. State's Appendix A. NRA glosses over the fact that the decision is final in the present case and cites decisions which dealt with jurisdictional challenges on *direct appeal.* Banking on cases which overturn decisions for lack of subject matter jurisdiction on *direct appeal* is unpersuasive because the concern for finality of judgment is absent in those cases. In its petition, NRA ignores the concern of finality of judgments, which is a pre-eminent component in evaluating its challenge of jurisdiction pursuant to rule 60(b)(4).

Under a rule 60(b)(4) motion, the concept of a void judgment, in the interest of finality, is narrowly construed. 7 *Moore's Federal Practice* ¶ 60.25[2], p. 225 (1987). Consequently, under a rule 60(b)(4) motion to set aside a judgment as void for lack of subject matter jurisdiction, the courts must balance the judicial concerns of the limits on federal jurisdiction against concerns for finality of judgments. Competing policies are at stake in setting aside a federal court judgment as void for lack of subject matter jurisdiction:

observation of the limits on federal jurisdiction and need for judgments that are final. *Kansas City Southern Railway Co. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 826 (8th Cir.) (*en banc*), *cert. denied*, 449 U.S. 955 (1980).

To reconcile these two fundamental yet competing concerns under a rule 60(b)(4) motion for lack of subject matter jurisdiction, the circuit courts established a dichotomy between an "error in the exercise of jurisdiction" from a "total want of jurisdiction":

> Absence of subject matter jurisdiction *may*, in certain cases, render a judgment void. However, this occurs only where there is a plain usurpation of power, when a court wrongly extends its jurisdiction beyond the scope of its authority. Stated another way, such plain usurpation of power occurs when there is a "total want of jurisdiction" as distinguished from "an error in the exercise of jurisdiction."

Kansas City Southern Railway Co. Great Lakes Carbon Corp., 624 F.2d 822, 825 (8th Cir.) (*en banc*), *cert. denied*, 449 U.S. 955 (1980) (citations omitted).

An erroneous assumption of subject matter jurisdiction is therefore not the equivalent to a "total want of jurisdiction," rendering a judgment void under rule 60(b)(4). *Jones v. Giles*, 741 F.2d 245, 248 (9th Cir. 1984).

The lower court in this decision also relied on the Second Circuit Court decision of *Nemaizer v. Baker*, 793 F.2d 58 (2d Cir. 1986) which held that:

> Since a court has the power to determine its own jurisdiction and, in fact, is required to exercise that power *sua sponte*, it does not plainly usurp jurisdiction when it merely commits an error in the exercise of that

> power. Rather, a Court will be deemed to have plainly usurped jurisdiction only when there is a "total want of jurisdiction" and no arguable basis on which it could have rested a finding that it had jurisdiction.

Nemaizer, 793 F.2d at 65. Consequently, there is a dichotomy between an "error in the exercise of jurisdiction" which is subject to reversal on direct appeal, but not subject to rule 60(b)(4) relief, from a "total want of jurisdiction" and "no arguable basis for a finding of jurisdiction" which are subject to rule 60(b)(4) relief.

In the present case, the Court correctly applied this principle, holding that the basis for NRA's removal, although perhaps erroneous, presented an arguable basis for a finding of federal jurisdiction. NRA had removed the State case to federal court on two grounds: federal preemption and the threat posed by the State's lawsuit to NRA's 1st amendment rights. The State's complaint charged that the NRA, through its political fund, contributed $4,950 to another political committee, a local Minnesota gun owners group. That contribution, NRA argued, was expressly authorized under the Federal Election Campaign Act, 2 U.S.C. § 441a(a)(2)(C), which permits a political fund such as NRA's to contribute up to $5,000 to another political committee. Therefore, according to NRA, the State's action was an attempt to interfere with activity expressly permitted by federal law.

In regard to the constitutional challenge, the State's complaint itself charged that the first and fourteenth amendment rights of NRA under the United States Constitution were not impermissibly abridged by application of the Minnesota statute requiring lobbyist and political fund registration. In other words, the plaintiff's complaint itself, NRA argued, raised

federal constitutional issues. The State has argued, and the courts have agreed, that while it may have been an error to exercise federal jurisdiction, there was an arguable basis for that finding and therefore no "total want of jurisdiction." [1]

In summary, there is a well-established and well-grounded dichotomy between an error in the exercise of jurisdiction, which is subject to reversal on direct appeal but not subject to relief under rule 60(b)(4); and a total want of jurisdiction or no arguable basis for a finding of jurisdiction, which is subject to relief under rule 60(b)(4). In the present case, while there may have been an error in the exercise of jurisdiction, there was no "total want of jurisdiction," rendering the judgment void.

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[1] The State takes strong exception to NRA's contention that the question of whether it is arguable federal law preempted state law is "moot" since the State does not contend federal law preempted state law. NRA's Petition, page 7, footnote 3. Obviously, the question is not moot since both the district court and court of appeals found that there was an arguable basis for a finding of federal subject matter jurisdiction and NRA is now appealing that decision. Jurisdiction to determine jurisdiction is not defeated by a subsequent determination that a court did not have subject matter jurisdiction. In other words, the fact that the opposing party argues, and the court holds, that the federal law did not preempt state law does not mean the removal was improper. Such a holding would mean that every time the underlying basis for the removal was not upheld on the merits, the floodgates would open with the loser moving to vacate the judgment as void. NRA refuses to recognize the procedural posture of the present case: we are no longer on direct appeal. Final judgment has been entered against NRA and the issues, including subject matter jurisdiction, have been litigated through the United States Supreme Court. Consequently, the standards and the issues in the present matter are wholly different. Pretending we are on direct appeal will not make it happen.

II. There Is No Conflict With This Court's Precedent.

NRA contends that the Eighth Circuit's decision in this case conflicts with this Court's decision of *Insurance Corporation of Ireland v. Compaignie des Bauxites*, 456 U.S. 694 (1982). To justify a grant of certiorari, the conflict must truly be direct and be readily apparent from the lower court's rationale or result. To the contrary, the present decision is harmonious with this Court's precedent.

First, the *Insurance Corporation* decision is not dispositive of the present decision because of the differences in the procedural positions of the jurisdictional challenge. In *Insurance Corporation*, this Court was addressing the jurisdictional challenge on *direct appeal*; the present case is indisputably past direct appeal. Therefore, *Insurance Corporation* is distinguishable because the concern of finality of judgments, which governs here, was not a factor in the *Insurance Corporation* decision.

Furthermore, ironically, the *Insurance Corporation* decision expressly supports the State's position and the court of appeals' decision. In its long quotation of the *Insurance Corporation* decision on page 7 of its petition, NRA omits a key footnote from the decision which states as follows:

> A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not, however, reopen that question on collateral attack upon an adverse judgment. It has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal.

Insurance Corporation, 456 U.S. at 702, n. 9.

Pointedly, this Court has repudiated NRA's present argument in holding that, notwithstanding the strict language

concerning the court's jurisdictional limitations, the limitations are nevertheless subject to concerns of finality.

NRA has responded to this argument claiming that this challenge is not a "collateral attack" because it is between the same parties in the same lawsuit. Therefore, NRA contends that principles of *res judicata* do not apply. Even if the technical rules of preclusion are not strictly applicable, the fundamental rationale behind the rules should apply with equal force to a challenge of a final decision by the same parties later in the same case. Otherwise, what is to prevent the litigants from returning to this Court a third or fourth time with the same argument in the same case?

In *Arizona v. California,* 460 U.S. 605, 619 (1983), this Court held that, even if the technical rules of preclusion are not strictly applicable, the principles upon which these rules are founded should inform the Court's decision. As this Court stated in another decision:

> The predicament in which respondent finds himself is of his own making. We cannot be expected, for his sole relief, to upset the general and well-established doctrine of *res judicata,* conceived in the light of the maxim that the interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy.

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 401-402 (1981) (quoting *Reed v. Allen,* 286 U.S. 191, 198-199 (1932)).

In summary, the *Insurance Corporation* decision is not dispositive of the present matter, and in fact supports the State's argument that, since NRA had the opportunity to litigate the jurisdictional issue through the full cycle of direct appeals, principles of *res judicata* are applicable.

III. There Is No Square And Irreconcilable Conflict Between The Decisions Of The Courts Of Appeals.

In its petition to this Court, NRA claims that the standard as developed by the Eighth and Second Circuits is at odds with five other circuits. To qualify for the grant of certiorari, there must be a real and embarrassing conflict of opinion and authority between the circuit courts of appeals. *Layne & Bowler Corporation v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

The present petition does not meet this threshold. There is no "true and direct conflict" between the courts of appeals on the issue of setting aside a final judgment for lack of subject matter jurisdiction. In fact, NRA has not cited one court decision which criticizes the standard as incorrect or wrong. Instead, NRA cites mostly early court of appeals' decisions when the articulation of the standard was less developed. Furthermore, most of the circuits cited by NRA as "in conflict" with the present decision have subsequently adopted and utilized the standard NRA is so troubled with. In fact, a review of the circuit decisions confirms the validity of and supports the present decision. A brief examination of each of NRA's cited "contrary" decisions will demonstrate that the alleged conflict is illusory.

The first purported conflicting decision cited by the NRA is the Ninth Circuit decision of *Gould v. Mutual Life Insurance Company of New York*, 790 F.2d 769 (9th Cir.), *cert. denied*, —— U.S. ——, 107 S. Ct. 580 (1986). The *Gould* decision is inapposite to the dispute of the standard in the present petition. The *Gould* decision does not rest on the dichotomy between a total want of jurisdiction and an error in the exercise of jurisdiction. Rather, the Court relied on a different principle—the law of the case doctrine—in holding that, despite

the lack of subject matter jurisdiction, the decision was not void under a rule 60(b)(4) motion.[2] Furthermore, the Ninth Circuit has in fact adopted the challenged principle that an error in interpreting a statutory grant of jurisdiction is not equivalent to acting with total want of jurisdiction and does not render the judgment a complete nullity. *Jones v. Giles*, 741 F.2d 245, 248 (9th Cir. 1984). Consequently, the Ninth Circuit supports the decision below.[3]

The second purported conflicting circuit, according to NRA, is the Sixth Circuit citing the decision of *Jordon v. Gilligan*, 500 F.2d 701 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975). However, as NRA admits in its petition, the *Jordon* decision was premised on the specific constitutional limitation

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[2] Ironically, the State has been citing the *Gould* decision in support of its position that the NRA's motion to vacate is barred, if not by *res judicata*, then by the doctrine of the law of the case. In *Gould*, the Court held that it previously considered, albeit on a petition for rehearing with suggestion for rehearing *en banc*, whether the district court lacked subject matter jurisdiction and rejected the contention. *Gould*, 790 F.2d at 775. In the present case, NRA's motion is similarly precluded by the law of the case doctrine. Two years ago, after the Supreme Court denied certiorari, NRA moved the Eighth Circuit to recall mandate and vacate judgment on the sole basis of lack of subject matter jurisdiction. The Eighth Circuit denied NRA's jurisdisdictional challenge. In addition, this Court denied NRA's jurisdictional challenge in its denial of the petition for writ of certiorari. *Minnesota State Ethical Practices Board v. National Rifle Association*, 474 U.S. 1082 (1986). Consequently, the *Gould* decision is in fact supportive of the State's position that NRA is precluded from moving to vacate the judgment.

[3] NRA raises a non-issue in its discussion of the appellate court's review of subject matter jurisdiction as "reviewable *de novo*." NRA's Petition, page 8. The State does not dispute the contention that, if the judgment is void, the district judge has no discretion in determining whether to vacate it. *Jones v. Giles*, 741 F.2d 245, 247 (9th Cir. 1984). However, the threshold question is whether or not the judgment is void. That standard and determination is in dispute in this petition. The State does not disagree that once a court has found that a judgment is void, it has no discretion whether to vacate it.

of the eleventh amendment prohibiting the award of attorney fees against unconsenting states. In any event, the Sixth Circuit has subsequently adopted and applied the principle that a "total want of jurisdiction must be distinguished from an error in the exercise of jurisdiction . . . and an error in that determination will not render the judgment void." *Hooks v. Hooks*, 771 F.2d 935, 949 (6th Cir. 1985). Plainly, there is no conflict with the present decision.

NRA also fabricates a conflict with the First Circuit, citing the decision of *Honneus v. Donovan*, 691 F.2d 1 (1st Cir. 1982). To the contrary, the First Circuit in *Honneus* held that the concept of a void judgment is narrowly construed and that, despite the erroneous assumption of jurisdiction, which would be subject to reversal on direct appeal, the judgment was not void precluding rule 60(b)(4) relief. *Honneus*, 691 F.2d at 2. Thus, the point of the case is exactly the same as the present decision: despite an erroneous exercise of jurisdiction, the Court would not grant rule 60(b)(4) relief.[4]

Fourth, NRA claims the Seventh Circuit "also has not adopted—and would find repugnant—the principle adopted by the Eighth and Second Circuits." NRA's Petition, page 11. To the contrary, the Seventh Circuit has, in fact, adopted the standard. For example, in *United States v. Zima*, 766 F.2d 1153 (7th Cir. 1985), the Court stated that because the appeal was from the denial of a rule 60(b)(4) motion to vacate on the grounds of lack of jurisdiction, the concept of void judgments is given a very restrictive interpretation and

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[4] After citing the *Honneus* case in support of its petition, NRA then attempts to distinguish the case by claiming that the error was "only an assumption of *diversity*, not subject-matter, jurisdiction." NRA's Petition, page 10, footnote 5. Unequivocally, diversity is one kind of subject matter jurisdiction and thus germane to the present dispute. For the response to NRA's argument about the discretion to grant the motion, see discussion in footnote 3.

is narrowly drawn in the interest of finality. *Zima*, 766 F.2d at 1159. Accordingly, the Seventh Circuit held, a total want of jurisdiction must be distinguished from an error in the exercise of jurisdiction. *Zima*, 766 F.2d at 1159. This is precisely the point in the present case. In regard to the allegedly conflicting decision in the Seventh Circuit, *Ben Sager Chemicals International v. E. Targosz & Co.*, 560 F.2d 805, 812 (7th Cir. 1977), the Court did not address in that case the dichotomy of whether there was a total want of jurisdiction in contrast to an error in the exercise of jurisdiction. Rather, the Court simply held that, despite the improper removal, the judgment was not subject to relief under rule 60(b)(4). *Ben Sager*, 560 F.2d at 812. Again, there is no conflict with the present case.

Finally, NRA cites the District of Columbia decision of *Potomac Passengers Association v. Chesapeake and Ohio Railway Co.*, 520 F.2d 91 (D.C. Cir. 1975) as conflicting with the present decision. This District of Columbia decision is irrelevant to the present dispute. The *Potomac* decision was not a rule 60(b)(4) challenge. Rather, the Court was reviewing subject matter jurisdiction on direct appeal of the decision on the merits. Thus, the strict jurisdictional limits applied in the *Potomac* decision were not tempered by the concerns of finality of judgment. Accordingly, the District of Columbia Circuit decision has no bearing on the validity of the principle applied in the present case.

In summary, a review of the allegedly conflicting decisions in fact establishes that the other circuits have adopted the same standard for a rule 60(b)(4) challenge of subject matter jurisdiction as in this case. Plainly, there is no conflict between the circuits, accordingly, there is no reason for this Court to grant discretionary review of this case.

IV. This Case Is Not An Appropriate Case To Grant Certiorari.

This case is unworthy of the Court's attention. This Court is not a forum for the correction of errors. *Boag v. MacDougall*, 454 U.S. 364, 367-368 (Rehnquist, J., Dissenting) (1982). Granting certiorari in this case would at the most be a correction of an error.

This case is particularly not an appropriate case for certiorari because the injury to NRA, if any, is an entirely self-inflicted strategic error. This case was originally filed by the State in the Minnesota state courts. NRA removed the matter to federal court. After having lost several rounds in federal courts, NRA is now requesting that the scarce resources of this Court be expended to correct an alleged, private and technical error.

Furthermore, this Court should not have to expend any more judicial time again considering the same argument by the same party in the same lawsuit. NRA already petitioned for a writ of certiorari on this case three years ago and raised the same argument it is raising now—lack of subject matter jurisdiction. For the familiar argument, see State's Appendix A. This Court denied NRA's petition then and it should do so now. The substantial case load of this Court is onerous without the litigants returning to this court with the same case and raising the same arguments. This duplicative petition for writ of certiorari should be promptly denied.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari filed by the Petitioner National Rifle Association, et al., should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

Portion of NRA's 1985 Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

I. THE DISTRICT COURT DID NOT HAVE SUBJECT-MATTER JURISDICTION.

Subsequent to the determination of the District Court that it had subject matter jurisdiction in the instant case, this Court decided *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841 (1983). In that case, this Court determined the circumstances under which a federal district court had jurisdiction over a civil action removed from a state court pursuant to 28 U.S.C. 1441, holding that:

> Congress has given the lower federal courts jurisdiction to hear . . . only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law. 463 U.S. at 27-28, 103 S.Ct. at 2856.

In the instant case, the complaint, initially filed in state court, alleged that the NRA had violated Minnesota law. The complaint was filed pursuant to *Minn. Stat.* 10A.34 which expressly authorizes such complaints and creates subject-matter jurisdiction for such complaints in the Ramsey County, Minnesota District Court. The complaint, while noting that NRA might raise the First and Fourteenth Amendments to the U.S. Constitution as a defense (Complaint ¶ 14), did not, however, establish "that its right to relief under [Minnesota]

law requires resolution of a substantial question of federal law in dispute between the parties." 463 U.S. at 13, 103 S.Ct. at 2848.

Franchise Tax Board also held that:

> a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case. 463 U.S. at 14, 103 S.Ct. at 2848.

In the instant case, two federal defenses were raised: 1) preemption by the Federal Election Campaign Act, as amended, 2 U.S.C. 431 *et seq.*, as to the count of the complaint relating to the $4,950 contribution by the NRA-PVF to the MGO-PVF[3] and 2) the guarantees of the First and Fourteenth Amendments as to the counts of the complaint relating to "lobbying" reporting and registration and as to the counts relating to the determination that NRA was a "political fund."

As can be seen from the complaint, the latter federal defenses were anticipated by the MEPB. Moreover, as is plain from the Court of Appeals decision, the parties effectively agreed that the applicability of the First and Fourteenth Amendments was the only question truly at issue in the case. As a consequence, this case falls squarely into the principles expressed by *Franchise Tax Board*, thereby mandating the conclusion that the District Court herein plainly lacked subject-matter jurisdiction and that the MEPB's motion to remand should have been granted.

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[3] As noted in footnote 2, *supra*, NRA-PVF complied with the District Court's order regarding reporting and did not appeal that order to the Court of Appeals.

A discussion of the applicability of *Franchise Tax Board* to the instant case is not complete without noting that two factors distinguish the instant case from *Franchise Tax Board*. First, in *Franchise Tax Board*, the plaintiff, after having been denied remand to the state court in which it had initially filed its complaint, raised the issue of subject-matter jurisdiction in the Court of Appeals when the defendent appealed after having lost on the merits. The plaintiff also renewed its argument that the District Court lacked subject matter jurisdiction when it petitioned the Court of Appeals for rehearing. 463 U.S. at 7, 103 S.Ct. at 2845. By contrast, in the instant case, while the plaintiff (MEPB) moved the District Court to remand the case to state court, it did not appeal the District Court's denial of the motion to remand nor did it raise that issue of subject-matter jurisdiction when the defendant (NRA) petitioned the Court of Appeals for rehearing.

Second, it is not MEPB (the plaintiff herein), as it was in *Franchise Tax Board*, who is raising the question of lack of subject matter jurisdiction; rather, it is NRA—upon whose motion the case was removed to federal court—who now raises lack of subject-matter jurisdiction.

Neither factor, however, should cause this Court to hesitate to hold that the District Court in the instant lacked subject-matter jurisdiction. It is well-settled that the jurisdiction of the lower federal courts is "limited to those subjects encompassed within a statutory grant of jurisdiction." *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 701 (1982). Consequently,

> *no* action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant (citation omitted), principles of

> estoppel do not apply (citation omitted), and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. (emphasis added) Id. at 702.

By not challenging jurisdiction in the Court of Appeals, MEPB, in effect, consented to the jurisdiction of the federal courts; such consent, however, did not give the Court of Appeals jurisdiction. Moreover, the fact that NRA was the party which initiated the removal to the District Court from the state court does not now prevent it from challenging jurisdiction at this point in the proceedings, both because "principles of estoppel do not apply" to questions of subject-matter jurisdiction and because, if NRA was prevented from challenging subject-matter jurisdiction at this stage in the proceedings, it would be tantamount to allowing the parties to agree to confer subject-matter jurisdiction.

Accordingly, to comply with the principles expressed in *Franchise Tax Board* and *Insurance Corp.*, this Court should, as it did in *Franchise Tax Board*, "vacate the judgment of the Court of Appeals and remand so that this case may be remanded to the" (463 U.S. at 28, 103 S.Ct. at 2856) District Court for Ramsey County.

APPENDIX B

NATIONAL RIFLE ASSOCIATION OF AMERICA, et al., petitioners, v. MINNESOTA STATE ETHICAL PRACTICES BOARD. No. 85-824.

Case below, 761 F.2d 509.

Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Jan. 21, 1986. Denied.

Supreme Court, U.S.
FILED
OCT 5 1988
JOSEPH F. SPANIOL, JR
CLERK

No. 88-300

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

THE NATIONAL RIFLE ASSOCIATION OF AMERICA, NEAL KNOX, WILLIAM B. BINSWANGER, WARREN CASSIDY, THE NATIONAL RIFLE ASSOCIATION POLITICAL VICTORY FUND, and MICHAEL K. MCCABE,

Petitioners,

v.

MINNESOTA STATE ETHICAL PRACTICES BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1988

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REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

In its Opposition to NRA's Petition, Respondent rephrases the "Question Presented For Review," stating that the issue is whether a district court must vacate a judgment, pursuant to Fed. R. Civ. P. 60(b)(4), "even though jurisdiction may be lacking provided there was an arguable basis for the exercise of jurisdiction and not

a total want of jurisdiction." This question is not, however, the question presented by this case.

In the first place, subject-matter jurisdiction *is* lacking. See, *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). Thus, this case is not one where subject-matter jurisdiction "may" be lacking. Second, the meaning of the phrase "a total want of jurisdiction" is an important aspect of the actual question presented for this Court's resolution; thus, asserting that there was "not a total want of jurisdiction" in the instant case merely begs the question. Notably, the lower court in the instant case wrote that the only issue before it was "whether or not there was an arguable basis on which the finding of jurisdiction in this case could have rested." Petitioner's Appendix, at 7a. In short, therefore, Respondent's phrasing of the question presented does not accurately represent the actual issue presented by this case; this Court should thus utilize the question presented by Petitioners.

REASONS FOR GRANTING THE PETITION

I. The Decision Of The Lower Court was Erroneous.

The essence of Respondent's initial argument is its statement that "an erroneous assumption of subject matter jurisdiction is . . . not the equivalent to a 'total want of jurisdiction,' rendering a judgment void under rule 60(b)(4). *Jones v. Giles*, 741 F.2d 245, 248 (9th Cir. 1984)." Brief in Opposition to Petition for Writ of Certiorari (hereinafter "Opposition"), at 6. This statement, aside from being wholly without support in any published decisions as demonstrated below, does not aid in the resolution the precise question presented by this case: whether the existence of an "arguable basis" on which subject-matter jurisdiction *could* have rested is a sufficient basis for denying a Rule 60(b)(4) motion. Once again, it should be emphasized that the absence or

presence of an "arguable basis" on which a finding of subject-matter jurisdiction could have rested was the only basis for the lower court's decision.

Turning to the accuracy of Respondent's statement, it is first important to note that the phrase a "total want of jurisdiction" initially appeared in *Lubben v. Selective Service System Local Board No. 27*, 453 F.2d 645 (1st Cir. 1972), and that every circuit court opinion since that time has relied on the language and reasoning in that case.[1] It is thus important to emphasize that, in *Lubben*, the First Circuit *equated* the "absence of subject-matter jurisdiction" to a "total want of jurisdiction" in distinguishing the absence of subject-matter jurisdiction "from an error in the exercise of jurisdiction." 453 F.2d at 649. Indeed, if the absence of subject-matter jurisdiction is not a "total want of jurisdiction"—as Respondent implies—it is impossible to conceive of a situation where there would be a "total want of jurisdiction." The reason for the First Circuit's finding is simple and straightforward: being a court of limited jurisdiction, either a district court has subject-matter jurisdiction or it does not. An "erroneous assumption of subject-matter jurisdiction" does not, moreover, change in any way the fact that, as a matter of law, subject-matter jurisdiction is lacking.

The Ninth Circuit decision relied upon by Respondent does not support its assertion. Indeed, *Jones v. Giles*, 741 F.2d 245 (9th Cir. 1984), is an example of a case where there was not a "total want of jurisdiction" (since subject-matter jurisdiction existed) but where there was "an error in the exercise of jurisdiction." As the Ninth Circuit stated clearly,

> the court had original jurisdiction over the case pursuant to 28 U.S.C. § 1337(a), and there is no ques-

---

[1] Despite *Lubben* being the seminal case in this area of law, no where does Respondent mention it.

> tion that the court had jurisdiction under 29 U.S.C. § 216(b) to decide whether appellees' overtime claims were exempt from the FLSA. Even assuming that the court erred in deciding the applicability of 29 U.S.C. § 213(b)(1), that error has no bearing on the court's power to decide those issues. 741 F.2d at 248.

Jones thus stands in stark contrast to the instant case since, in the instant case, the district court plainly did not have subject-matter jurisdiction pursuant to 28 U.S.C. 1441. See *Franchise Tax Board, supra.* Moreover, *Jones* does not even hint that a judgment is void only when there is *both* a "total want of jurisdiction" *and* no "arguable basis" on which subject-matter jurisdiction could have rested. Thus, *Jones* is clearly in conflict with the decision in the instant case.

In view of the above, there is clearly uncertainty among the circuits regarding the meaning of the now-widely used phrase "a total want of jurisdiction." Thus, whether or not the existence of an "arguable basis" for a finding of subject-matter jurisdiction is a sufficient basis to grant Rule 60(b)(4) relief, this Court, having never visited this narrow but important issue, should now do so.

II. The Decision in this Case is in Direct Conflict with this Court's Jurisprudence.

First, while it is true that *Insurance Corporation of Ireland v. Compagnie Des Bauxites*, 456 U.S. 694 (1982), addressed the issue of subject-matter jurisdiction on direct appeal, there is nothing in the unqualified opinion which in any way suggests that the principles set forth therein do not apply to Rule 60(b)(4) motions. Indeed, Respondent has not cited a single authority, from any court or any commentator, supporting its assertion. As a result, it is apparent that the decision in the instant case

—which effectively holds that a federal district court *may* decide a case when it lacks subject-matter jurisdiction—*is* "truly" in conflict with *Insurance Corporation of Ireland* and should be reviewed by this Court.

Second, as it has continued to do throughout this litigation, Respondent suggests that Petitioners may not " 'reopen [the] question [of subject-matter jurisdiction] on collateral attack upon an adverse judgment.' *Insurance Corporation of Ireland*, 456 U.S. at 702 n.9." Opposition, at 9. As Respondent then notes, however, NRA's Rule 60(b)(4) motion is not in fact a "collateral attack." Thus, the quotation from the *Insurance Corporation of Ireland* footnote is inapposite. Nonetheless, Respondent goes on to urge that "the fundamental rational behind the [technical] rules [of preclusion] should apply with equal force to a challenge of a final decision by the same parties in the same case." Opposition, at 10. In support of that assertion, Respondent cites *Arizona v. California*, 460 U.S. 605 (1983). It is difficult to understand, however, why Respondent cites *Arizona v. California* since, in that case, this Court expressly held that "[i]t is clear that res judicata and collateral estoppel *do not apply* if a party moves the rendering court in the same proceeding to correct or modify its judgment." (emphasis added) 460 U.S. at 619.

Respondent also quotes from *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981). This case is, however, wholly inapposite to the instant case since it involved two separate lawsuits.[2]

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[2] Respondent rhetorically asks, if the fundamental rationale behind the technical rules of preclusion do not apply "to a challenge of a final decision by the same parties later in the same case . . ., what is to prevent the litigants from returning to this Court a third or fourth time with the same argument in the same case?" Opposition, at 10. The simple answer to that question is that, once the issue in the Rule 60(b)(4) motion is resolved in the context of the motion, *res judicata* does apply to that issue in a subsequent Rule 60(b)(4) motion. This, however, is not such a case.

III. The Courts of Appeals for the Second and Eighth Circuits are in Direct Conflict with Five other Courts of Appeals.

Respondent asserts that "most of the circuits cited by NRA as 'in conflict' with the present decision have subsequently adopted and utilized the standard NRA is so troubled with." Opposition, at 11. In fact, as even a cursory review demonstrates, not a single circuit of those relied upon by Petitioner—nor any others—has "adopted and utilized" the "arguable basis" standard which Respondent seeks to have this Court uphold.[3]

Turning to the specific cases, Respondent first asserts that, in *Gould v. Mutual Life Insurance Company of New York*, 790 F.2d 769 (9th Cir. 1986), *cert. denied*, —— U.S. —— (1986), the court denied a Rule 60(b)(4) motion "despite the lack of subject matter jurisdiction. . . ." Opposition, at 11-12. Respondent does not cite language from the opinion to support this assertion as well as it could not since the Ninth Circuit expressly held exactly the opposite: that "the court below *had* subject-matter jurisdiction." (emphasis added). 790 F.2d at 774. Moreover, *Gould* cited with approval a prior opinion, *Watts v. Pickney*, 752 F.2d 406 (9th Cir. 1985) in which the Ninth Circuit had held that "a district court is 'compelled to exercise its authority under Rule 60(b)(4) to vacate' judgments in which it had erroneously asserted its own jurisdiction." 790 F.2d at 774. Thus, it is evident that the controlling rule in the Ninth Circuit is that, if there is an error in the assertion of subject-matter jurisdiction, a Rule 60(b)(4) motion to

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[3] While Respondent implies that Petitioners complain that it is the distinction between the treatment accorded an error in the exercise of jurisdiction and that accorded a total want of jurisdiction, this is false; it is the use of an "arguable basis" standard in conjunction with the total want of jurisdiction standard in determining whether to grant a Rule 60(b)(4) motion to which Petitioners object.

vacate *must* be granted. It follows, therefore, that the Ninth Circuit is in direct conflict with the Second and Eighth Circuits.[4]

The Sixth Circuit's decision in *Hooks v. Hooks*, 771 F.2d 935 (6th Cir. 1985) is, contrary to Respondent's assertion, entirely consistent with the principle set forth in the Sixth Circuit's earlier opinion in *Jordon v. Gilligan*, 500 F.2d 701 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975) and in no way adopts—it does not even allude to—the "arguable basis" standard adopted by the Second and Eighth Circuits. Indeed, *Hooks* expressly relies upon the First Circuit's decision in *Lubben, supra*, in which the First Circuit *equated* the absence of subject matter jurisdiction to a total want of jurisdiction. Moreover, in explaining that the lower court "certainly had potential jurisdiction over the dispute" and that it only "may have erred in determining that it retain continuing jurisdiction," 771 F.2d at 950, *Hooks* made clear that the Sixth Circuit, unlike the Second and Eighth Circuits, recognized the distinction between a total want of jurisdiction and a mere error in the exercise of jurisdiction.

In attempting to argue that there is no conflict between the First Circuit and the Second and Eighth Circuits, Respondent briefly discusses *Honneus v. Donovan*, 691 F.2d 1 (1st Cir. 1982) leaving out any discussion of *Lubben, supra*, the seminal case in this area and the case that demonstrates the conflict between the First Circuit and the Second and Eighth Circuits. Moreover, there is nothing in *Honneus* that suggests that the "arguable basis" standard adopted by the Second and Eighth Circuits would be acceptable in the First Circuit. Indeed, *Honneus*, emphasizes that "a judgment is either void

[4] The Ninth Circuit's prior opinion in *Jones v. Giles, supra*, is not to the contrary since, as the court noted in *Jones*, the District Court "had original jurisdiction over the case . . . and there is no question that the court had jurisdiction . . . to decide" the case before it. 741 F.2d at 248.

or it is not," 691 F.2d at 2, thus recognizing that the presence of an "arguable basis" would be immaterial in deciding a Rule 60(b)(4) motion.

Next, Respondent asserts that "the Seventh Circuit has, in fact, adopted the standard" adopted by the Eighth and Second Circuits. Opposition, at 13. In support of that assertion, Respondent cites *United States v. Zima*, 776 F.2d 1153 (7th Cir. 1985). Even a cursory reading of *Zima* fails to reveal that the Seventh Circuit has adopted the "arguable basis" standard adopted by the Eighth and Second Circuits. Quite the contrary, *Zima* held that a judgment *is* void "if the court has no power to adjudicate the issues before it." 766 F.2d at 1159. Thus, the court did not grant the Rule 60(b)(4) motion because the district court "initially had the power to exercise jurisdiction over the ancillary claims." 766 F.2d at 1159. By contrast, in the instant case, the district court did not initially, or ever, have jurisdiction over Respondent's claims.[5]

Finally, Respondent asserts that the decision in *Potomac Passengers Association v. Chesapeake and Ohio Railway Company*, 520 F.2d 91 (D.C. Cir. 1975) is "irrelevant to the present dispute." Opposition, at 14. While it is true that *Potomac Passengers Association* was not a Rule 60(b)(4) case, the District of Columbia Circuit recognized that

> [if] a federal court is powerless to adjudicate a controversy, it is duty-bound to recognize that fact, however belated its realization. . . . when an appellate court makes so fundamental an error as that of sus-

[5] Respondent asserts that the distinction between a total want of jurisdiction and an error in the exercise of jurisdiction "is precisely the point in the present case." Opposition, at 14. In fact, it is not at all the point in the present case. The point in the present case is whether the existence of an "arguable basis" for subject-matter jurisdiction, where no subject-matter jurisdiction exists, is a sufficient ground to deny a Rule 60(b)(4) motion.

> taining federal subject-matter jurisdiction where none exists, we think the court must exercise its discretion to correct that mistake. 520 F.2d at 95, n.22.

Plainly, this language is relevant to the instant case since the court stressed that a court is "duly bound" to vacate a judgment where subject-matter jurisdiction is absent "however belated its realization. . . ." In so saying, the District of Columbia Circuit Court simply gave meaning to the Court's mandate that, in the context of subject-matter jurisdiction, "principles of estoppel do not apply. . . ." *Insurance Corporation of Ireland*, 456 U.S. at 701.

Were Respondent's assertion true that this Court's decision in *Insurance Corporation of Ireland* and the District of Columbia's Circuit's opinion in *Potomac Passengers Association* are not relevant to the instant case, Rule 60(b)(4) would effectively be eviscerated and of little value. Plainly, however, Rule 60(b)(4) has some purpose; that purpose is to allow, if nothing else, judgments made without subject-matter jurisdiction to be vacated.

IV. A Writ of Certiorari is Appropriate in this Case.

Respondent's primary assertion is the fact that "the injury to NRA, if any, is an entirely self-inflicted strategic error." Opposition, at 15.

It should be noted first that *Insurance Corporation of Ireland* made clear that, when challenging subject-matter jurisdiction, "principles of estoppel do not apply. . . ." 456 U.S. at 701. Thus, even if Respondent's assertion was entirely accurate, it is, as a matter of law, wholly immaterial.

Second, as Respondent concedes, it "withdrew its motion to remand. . . ." Opposition, at 2-3. Thus, the fact that the issue of subject-matter jurisdiction has had to have been litigated in the context of a Rule 60(b)(4) motion is, in large part, due to a conscious decision by Respondent not to raise the issue at an early time in the litigation.

Finally, the removal petition filed by Petitioner was filed by Petitioners' *former* counsel, who was relieved by Petitioners after the initial appeal to the Eighth Circuit. Certainly, extreme limitations on the future exercise of Petitioners' First Amendment rights—which will certainly be the result if this Petition is not granted—should not remain in place simply because of an erroneous decision —which even Respondent recognized was erroneous—by Petitioners' former counsel. Indeed, as this case, at bottom, involves the ability of Petitioners to exercise their First Amendment rights, the subject-matter jurisdiction of the District Court should not merely be "arguable," but should be certain and wholly justified. As subject matter jurisdiction in the instant case is certainly in doubt, it is exceedingly appropriate that a Writ of Certiorari be granted in the instant case.

CONCLUSION

For the reasons set forth above and in the Petition for a Writ of Certiorari, this Court should issue a Writ of Certiorari to the Eighth Circuit.

Respectfully submitted,

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